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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN LEONIDES ESCOBAR et al., Defendants and Appellants.	B259309 (Los Angeles County Super. Ct. No. TA127185)

APPEAL from judgments of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed in part, vacated in part, and remanded with directions.

Wegman & Levin, Debra J. Wegman and Michael M. Levin for Defendant and Appellant Jonathan Leonides Escobar.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Gutierrez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Jonathan Leonides Escobar and Jorge Gutierrez appeal from the judgments entered after a jury convicted each of them on two counts of attempted willful, deliberate, and premeditated murder (counts 1 & 2) and on count 3 – shooting from a motor vehicle. On each of counts 1 and 2, as to Escobar, the jury found a principal personally and intentionally discharged a firearm causing great bodily injury. On each of counts 1 and 2, as to Gutierrez, the jury found he personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury. On count 3, as to Gutierrez, the jury found he personally used a firearm. The jury also found, as to each appellant on each of the above counts, the offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang. (Pen. Code, §§ 186.22, subd. (b)(1), 664, 187, 12022.5, 12022.53, subds. (c), (d) & (e)(1) & 26100, subd. (c).[1]) The court sentenced each appellant to prison for 80 years to life. We vacate appellants' sentences and remand for resentencing, but otherwise affirm.

[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established that in February 2013, 17-year-old Justin Padilla (Justin)[2] lived in an apartment at Grand and Imperial Highway in Los Angeles. About 9:00 p.m. on February 27, 2013, Justin and his friend Diego Fernandez (Diego) were playing in the backyard. Neither Justin nor Diego was a gang member.

A Toyota automobile drove up and stopped 21 feet from Justin and 29 feet from Diego. The Toyota's passenger side was closest to Justin and Diego. The car contained two Hispanic men and the passenger had a scarf or bandana covering his mouth. The car's front passenger window was down. The passenger asked Justin and Diego, "Where you fools from?" Justin believed the question was a gang challenge. Justin did not pull out a weapon and he never saw Diego pull out one. The passenger began shooting. Justin heard eight or 10 shots and ran towards the apartment building. A bullet struck Justin in the ankle and he fell. Another bullet struck Justin in the buttocks. Justin rose and entered his apartment. As Diego was running, he heard multiple gunshots but not more than 15. Diego was not hit by gunfire. However, the prosecutor asked if Diego could hear "bullets hitting anything around [Diego]" and Diego replied, "Yes, the gate." The bullet made a hole in the gate. Diego heard Justin

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[2] To avoid confusion with other witnesses having the same last name as the victims, we refer to both victims by their first names.

falling behind him. Diego turned back to go to Justin as shots were fired.[3] The Toyota drove away.

Justin and Diego testified in particular concerning various photographs (People's exh. Nos. 1 – 4, 6 – 8, and 14), depicting the shooting scene and admitted into evidence, as follows. The photographs depicted the backyard in which Justin and Diego were playing. People's exhibit No. 4 depicted the backyard as it looked that evening. Justin, using his initials "JP," marked on People's exhibit No. 4 where he was standing when he saw the car. He also, using the initials "DF," marked where Diego was standing when the car pulled up and Justin heard the question, "Where you guys from?" Justin drew a rectangle on People's exhibit No. 4 to represent where the car stopped. Diego, using the initials "JP" and "DF," marked on People's exhibit No. 6 (apparently a duplicate of People's exh. No. 4) where Justin and Diego, respectively, were when Diego saw the car. Diego drew a circle on People's exhibit No. 6 to represent where the car stopped.

Justin testified he ran "to the back of the house," then "on the side," and he drew arrows on a photograph (People's exh. No. 2) to represent where he ran. Diego testified he ran to the side of the house when the shooting started and a photograph (People's exh. No. 7) depicted where he ran. He heard bullets hitting the gate and testified a photograph (People's exh. No. 7) depicted the

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[3] During the People's direct examination of Diego, the following occurred: "Q So if I understand you, there were *shots fired and* you ran? [¶] . . . [¶] A Yes. [¶] Q Okay. *And you hear* somebody fall at that point -- [¶] A Yes. [¶] Q -- while you're running? [¶] A Yes. [¶] Q *And that's when you turned back* to go to your friend? [¶] Q Yes." (Italics added.)

gate. After the shooting, he looked at the gate and saw a bullet hole in it as depicted in a photograph (People's exh. No. 8). The bullet hole is in the south portion of the gate.

Los Angeles Police Officer Billy Lee was off-duty and driving his personal car on Grand when he heard shooting. He heard six to eight more shots and saw muzzle flashes coming from the front passenger window of a Toyota about 130 to 150 feet in front of him in the southbound curb lane. The front passenger was shooting in a westerly direction towards an apartment complex on the northwest corner of Grand and Imperial Highway. Lee saw a person's arm and hand extending out the window and the hand was holding a firearm. After the shooting, the Toyota sped away.

Lee called 911 and followed the Toyota. Lee, later assisted by Los Angeles Police Officers Gil Padilla and Phillip Sudario in a patrol car, engaged in a high speed pursuit of the Toyota. During the pursuit, the Toyota crashed into a car, a black object was thrown from the driver's side of the Toyota, and the pursuit resumed. The pursuit ended near the 405 and Harbor freeways. The driver and passenger exited the Toyota and fled. Sudario ran after the driver, Escobar, and detained him. The passenger, Gutierrez, fled into nearby bushes and Lee saw officers detain him. Later, Los Angeles Police Detective Joseph Kirby was escorting Escobar through the police station when Escobar yelled at Gutierrez, "You better not snitch."

Los Angeles Police Detective Rosa Torres went to the shooting scene and found eight .40-caliber casings on Grand. The casings were consistent with a car's occupant firing a firearm while reaching out the window. Torres observed bullet damage on a front fence, and on a fence towards the rear of the apartment

complex. Torres testified a photograph (People's exh. No. 14) depicted bullet marks on the front fence, and a photograph (People's exh. No. 8) depicted bullet damage to the rear fence. Los Angeles Police Officer Marcos Mercado went to the Harbor Freeway near the Rosecrans onramp (where the black object had been thrown from the Toyota) and found parts of a .40-caliber semiautomatic handgun. Gutierrez tested positive for gunshot residue on his hand or hands,[4] which meant he had discharged a firearm, had been in the immediate vicinity of a discharging firearm, or had contacted the surface of an object (e.g., a gun or bullet) already contaminated with residue.

Several officers testified to having personal interaction with appellants prior to the shooting. Los Angeles County Sheriff's Deputy Anthony Fernandez identified Escobar in court. Fernandez testified he was on patrol on March 4, 2011, when he contacted Escobar at 1219 106th Street in the company of Eric Diaz and Luciano Islas.[5] In an admissibility hearing conducted under Evidence Code section 402, Fernandez testified he

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[4] A detective testified he collected a "gunshot residue kit" (Peo. exh. No. 15) from Gutierrez's "hands." A criminalist testified the kit contained a "stub" for each hand, he analyzed each stub, he found "gunshot residue particles on the kit," and "if we find . . . a gunshot residue particle," "then we believe gunshot residue was present on the hands."

[5] Fernandez used a field identification card to refresh his memory as to Islas's name. The card was not admitted into evidence. Los Angeles County Sheriff's Detective Albert Arevalo testified that Diaz and Islas told him they were Junior Mafia gang members with the monikers Scrappy and Lefty, respectively.

"consensually contacted [Escobar], walked up to him, introduced myself, and saw him and two other individuals." Fernandez testified at trial that when Fernandez asked whether Escobar was affiliated with a gang, Escobar admitted, "I'm from Junior Mafia" (JM) and that his moniker was Smiley. Escobar also showed his tattoo with the letters SCLA to Fernandez. Based on a photograph, Fernandez testified at trial that the tattoo on Escobar's body was the one Fernandez saw during the March 2011 contact. Respondent's gang expert, Los Angeles County Sheriff's Detective Albert Arevalo, testified that the SCLA tattoo referred to the South Central clique of the JM gang and that he had seen SCLA tattoos on other JM members.

Other law enforcement personnel testified to their prior contacts with Gutierrez. Los Angeles Police Officer Jose Bonilla identified Gutierrez at trial and testified to a May 23, 2012 conversation with Gutierrez and Javier Alvarez. According to Bonilla, Gutierrez and Alvarez told him they were JM members, known respectively by the monikers Speedy and Huero. Los Angeles County Sheriff's Deputy Jeremiah Hooper testified that on October 13, 2011, Gutierrez and three other people, including Gustavo Reyna and Javier Alvarez, were together at 107th and Budlong in Los Angeles, and Hooper contacted them there.

Arevalo recalled that various unidentified JM members told him that Gutierrez was a JM member known as Speedy. Arevalo also testified that Emmanuel Mendoza, a JM member known as Flaco who sometimes served as an unpaid informant, told Arevalo that Mendoza's brother "Jorge" was a JM member known as Speedy. Testifying as an expert, Arevalo opined Gutierrez was an active JM member based on (1) Hooper's report that he saw Gutierrez with other gang members at 107th and

Budlong (in JM territory) on October 13, 2011, (2) the fact that Gutierrez's associates as reflected in Hooper's field identification card were gang members, (3) Bonilla's "report," (4) contacts Arevalo had had with JM members who told him Gutierrez, also known as Speedy, was an active JM member, and (5) the fact Mendoza told Arevalo that Mendoza and his brother were JM members, Mendoza's brother's name was Jorge, and Jorge's moniker was Speedy.

Arevalo also opined that Escobar was a JM member based on (1) Escobar's March 4, 2011 admission to Fernandez (memorialized in a field identification card) that Escobar was an active JM member whose moniker was Smiley, (2) the fact that Escobar's admission occurred in JM gang territory (1219 106th Street), and (3) the fact that Escobar had a tattoo indicative of JM's South Central clique. Arevalo further opined that appellants were respected JM members who were soldiers, i.e., violent members assigned to commit shootings, and Arevalo indicated the basis for his opinion was his conversations with various unidentified JM members. When cross-examined about that opinion, Arevalo denied that gang members told him Gutierrez was a "soldier." Arevalo testified that gang members characterized Gutierrez "as an active gang member . . . I guess, in essence, a soldier."

Explaining his qualifications to testify as an expert, Arevalo testified he was assigned to a gang unit and had investigated the JM criminal street gang and the crimes it had committed in his jurisdiction since 2009. Prior to this case, Arevalo had testified dozens of times as a JM expert and as a South Los gang (South) expert. JM had about 80 documented members and Arevalo had spoken with more than 12 of them.

During the Evidence Code section 402 admissibility hearing, he testified he learned about gangs by talking to gang members and their families casually and consensually out in the field or when he happened to chat with them while working as a jailer. Arevalo always corroborated what he learned from gang members.

Arevalo explained the hierarchy of respect in gangs, testifying that gang members gain respect from their peers by putting in work (committing more violent and conspicuous crimes). He contrasted lower level gang members who break into cars or peddle dope with gang members "that are soldiers or gunners . . . the violent ones . . . the ones that people can count on to go do shootings." He identified JM's hand signs, graffiti, and symbols, and types of hats worn by JM members.

Arevalo provided testimony specific to the day of appellants' shootings. He stated that earlier the same day, about 7:00 a.m. on February 27, 2013, South members shot JM members Javier Alvarez and Carlos Reyna at Imperial Highway and Vermont, killing Reyna and injuring Alvarez. In response to a hypothetical question based on evidence, Arevalo testified the present shooting was committed for the benefit of, and in association with, the JM criminal street gang. The shooting benefited JM because Carlos Reyna, a well-respected JM member, had been murdered earlier that day. The present shooting happened shortly thereafter and was, in Arevalo's opinion, a retaliatory shooting that enhanced JM's reputation for violence and demonstrated to a rival gang that JM would retaliate if something happened to a JM member. Appellants' shooting also created fear in the community, making it less likely community members would report JM's criminal activity.

Although the shooting was not at South members, Arevalo testified the shooting benefited JM because it was carried out in South's territory.

Arevalo opined the present shooting was committed in association with a gang because the driver and shooter were JM members. Arevalo explained that when gang members went on missions, the gang members brought trusted persons who would act as backup, not "snitch," and confirm to a gang that a gang member had committed a crime. Arevalo opined the present shooting was a gang crime because it occurred in South's area in the midst of growing sentiment that South members killed Carlos Reyna, making it incumbent on JM to retaliate against South members or in South territory.[6] Arevalo found no documentation the victims (Justin and Diego) were gang members.

In the defense case, Escobar's gang expert, Martin Flores, testified one possibility was the present shooting benefited the gang, but another possibility was the shooter had a personal "beef" with the targeted persons and the driver did not know what was happening. He opined that the rule in Hispanic gangs was not to target a random civilian. Gutierrez presented witnesses testifying about his good character, nonviolent nature, and lack of gang affiliation.

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[6] Arevalo added, "you don't have to say, 'Where are you from' . . . . Everyone in that neighborhood who's a gang member, from Junior Mafia or South Los, knew that Carlos Reyna . . . had been killed, knew that [he] was shot by South Los gang members." Gutierrez interrupted, posing a speculation objection. Escobar's counsel interjected, "Everybody in that neighborhood knew." The court stated, "As to that, that will be stricken as speculation."

ISSUES

Gutierrez asks this court to conduct an independent review of the in camera hearing on his *Pitchess*[7] motion. He also claims (1) insufficient evidence supports his convictions, the premeditation and deliberation findings, and the gang finding, (2) the trial court erroneously imposed consecutive sentences, concerning which Gutierrez's trial counsel rendered ineffective assistance of counsel, (3) Gutierrez's sentence constituted cruel and unusual punishment, and (4) the court's kill-zone instruction was erroneous.

Escobar claims (1) the People relied on testimonial hearsay to prove the gang enhancement, (2) the Sixth Amendment prohibits an expert witness from disclosing testimonial hearsay as basis evidence at trial, (3) under California law, Arevalo's disclosure of testimonial hearsay as basis evidence violated Escobar's Sixth Amendment confrontation right, and (4) the prosecutor's closing argument constituted impermissible comment on Escobar's exercise of a constitutional right.[8]

DISCUSSION

1. *The Trial Court Fulfilled Its Responsibilities Under Pitchess.*

Gutierrez filed a pretrial *Pitchess* motion seeking information from the personnel files of Arevalo on various issues. The supporting declaration of Gutierrez's counsel reflected that on May 15, 2013, Arevalo told a deputy district attorney that Gutierrez had admitted to Arevalo that Gutierrez was in a gang. Gutierrez's counsel, on information and belief, denied Gutierrez made any statement to Arevalo. At the May 21, 2014 hearing on

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7 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

8 Each appellant joins in the claims of the other.

the motion, the court granted the motion, limited to the issues of "dishonesty and moral turpitude," then conducted an in camera hearing and ordered sealed the transcript thereof. Following the in camera hearing, the court indicated that, after reviewing what the Los Angeles County Sheriff's Department (the real party in interest) had presented in camera, the court was not ordering discovery.

Gutierrez asks this court to conduct an independent review of the in camera hearing. Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827 (*Samayoa*); *People v. Memro* (1995) 11 Cal.4th 786, 832.) We have reviewed the contents of the sealed transcript of the May 21, 2014 in camera hearing. The transcript constitutes an adequate record of the trial court's review of any document(s) provided to the trial court during said hearing, and fails to demonstrate the trial court abused its discretion by failing to disclose information. (Cf. *Samayoa*, at p. 827; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232.) The trial court fulfilled its responsibilities under *Pitchess*.

2. *Sufficient Evidence Supports Appellants' Attempted Murder Convictions and the Premeditation and Gang Findings.*

Appellants claim there is insufficient evidence supporting his attempted murder convictions and the premeditation, deliberation, and gang findings. We disagree. Our task is to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt, and we view the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the jury could

reasonably deduce from the evidence. (*Ochoa, supra*, 6 Cal.4th at p. 1206.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Evidence of attempted murder must establish "the defendant harbored express malice toward the victim, i.e., the defendant either desired the victim's death or knew to a 'substantial certainty' that the victim's death would occur. [Citation.]" (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 389.) The act of discharging a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)[9]

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[9] The court, using CALCRIM No. 600 (read as a whole and reasonably understood), instructed the jury, inter alia, that (1) to prove attempted murder, the People had to prove the defendant intended to kill a person, and (2) the attempted murder of Diego was based on the kill zone theory the defendant intended to kill Justin by killing everyone in the kill zone, including Diego, or based on the theory that defendant intended to kill Diego. (See fn. 14, *post*.)

Moreover, the law applicable to premeditation and deliberation is settled.[10]

In the present case, there was substantial evidence supporting the convictions for attempted murder and the findings of premeditation and deliberation. Justin and Diego, neither of whom was armed or a gang member, were innocently playing in

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10 "Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Deliberation and premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, sets forth three categories of evidence relevant to whether a defendant harbored premeditation: planning activity, prior relationship, and (in the context of murder) the manner of killing. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.) The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) An assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333.) A jury may determine whether premeditation exists "from a consideration of the type of weapon employed and the manner of its use; the nature of the wounds suffered by the [victim]; the fact that the attack was unprovoked and that the [victim] was unarmed at the time of the assault; the conduct of [the] assailant in . . . neglecting to aid [the victim], and [the assailant's] immediate flight thereafter from the scene of the assault." (*People v. Cook* (1940) 15 Cal.2d 507, 516.) The jury may also consider efforts to conceal the weapon used. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529.)

the backyard of Justin's apartment building when Escobar drove up in a Toyota with Gutierrez. Escobar pulled the Toyota over to the curb, placing Gutierrez, who was on the passenger side, as close as possible to the victims. The positioning of the Toyota evidenced planning activity and thus premeditation, as did the fact the front passenger window was down when the car came to a stop. Gutierrez's election to conceal his face with a scarf or bandanna evidenced consciousness of guilt regarding the attempted murders. It also evidenced planning, hence premeditation. Appellants were gang members and Gutierrez asked Justin and Diego, "Where you fools from," a gang challenge providing evidence of a motive for appellants' intent to kill and premeditation.

The fact Gutierrez immediately fired meant appellants *arrived* with the gun loaded, intending to shoot; this too was evidence of premeditation. Reaching out the window demonstrated an intent to shorten the distance between Gutierrez and the victims; this was further evidence of intent to kill and premeditation.

Gutierrez fired at least eight times toward the location where Justin and Diego were playing, wounding Justin in the buttocks and ankle (and there was evidence Gutierrez's weapon was a semiautomatic handgun); these facts provided evidence of both intent to kill and premeditation. The testimony of Justin, Diego, and Torres, and the photographs admitted in evidence, provided substantial evidence as follows. Justin and Diego were in a relatively small and confined backyard, the two concluded their best chance of escaping was to run southwest towards the side of the house, Gutierrez was shooting at them as they fled and converged towards the narrow opening on the side of the

house, and he intended to kill Justin and Diego or intended to kill Justin by intending to kill everyone, here Diego, in a kill zone. This was evidence of intent to kill. There was substantial evidence that during the ongoing shots, Diego was *close enough* to Justin to hear him fall and to turn back to help him. (See fn. 3, *ante*.) This was evidence of intent to kill both Justin and Diego. Although the bullets missed him, Diego heard one strike a nearby gate; this too was evidence of intent to kill both victims.

Casing evidence discovered at the location of the shooting was consistent with the passenger firing the gun while reaching out the window. Appellants' flight from the scene, speeding away in the Toyota, manifested consciousness of guilt regarding the attempted murders. (Cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246; § 1127c.)

Lee pursued appellants, and Officers Padilla and Sudario later joined Lee and conducted a high-speed chase. During the pursuit, one of the appellants, or both of them, threw out of the Toyota's driver's side window a .40-caliber semiautomatic handgun. After the Toyota finally stopped with police in pursuit, appellants fled from the Toyota on foot. All of these acts evidenced consciousness of guilt regarding the attempted murders. Escobar's admonition to Gutierrez not to snitch was further evidence of Escobar's consciousness of guilt. (*People v. Slocum* (1975) 52 Cal.App.3d 867, 887.) Gutierrez had gunshot residue on his hand(s), evidence he was the shooter and directly perpetrated the attempted murders. As we discuss *post*, there was substantial evidence appellants were JM members who committed the present shootings for the benefit of, and in association with, JM, in retaliation for South's shooting of other JM members earlier that day.

The fact the bullets were not lethal does not undermine the evidence of intent to kill. There was substantial evidence Gutierrez fired a fusillade of bullets in the direction of Justin and Diego, supporting the jury's conclusion that appellants' purpose was to kill Justin and Diego. The fact "the victim[s] may have escaped death because of the shooter's poor marksmanship" (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945) when using a high-caliber weapon does not vitiate intent to kill. (*Ibid.*) We conclude there was sufficient evidence appellants committed the attempted murders of Justin and Diego, and sufficient evidence appellants committed those offenses with premeditation and deliberation.

We also conclude sufficient evidence supported the gang findings. Deputy Fernandez testified that in March 2011, Escobar admitted to Fernandez that Escobar was a JM member. Fernandez testified from personal knowledge and recollection of his encounter with Escobar, using the field identification card (which was not admitted into evidence) only to refresh his memory as to Luciano Islas's name. Escobar's admission of JM gang membership was corroborated by the SCLA tattoo he displayed to Fernandez in 2011, a tattoo that remained on his body at the time of trial. Arevalo identified the tattoo as one worn by other gang members. When Fernandez encountered Escobar in 2011, Escobar was in JM gang territory and in the company of Islas who, on another occasion, admitted to Arevalo that Islas was a JM gang member. A New York Mets hat typically worn by JM members was found in appellants' vehicle.

Similarly, Officer Bonilla testified that in May 2012, Gutierrez and Alvarez told Bonilla that the two were JM members known as Speedy and Huero, respectively. Deputy Hooper testified that in October 2011, Gutierrez and three other people, including Gustavo Reyna and Alvarez, were together at 107th and Budlong in Los Angeles, and Hooper contacted them there. The location of the shooting (in or on the border of South's territory), its perpetration by two JM gang members (one of whom asked the victims where they were from), and its occurrence hours after JM members learned that one of their members was the victim of a fatal shooting attributed to a rival gang, provide additional evidence of Escobar's gang affiliation and commission of the crime for gang-related purposes.

There was substantial evidence appellants committed the attempted murders "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b)(1). (Cf. *People v. Albillar* (2010) 51 Cal.4th 47, 59-63, 68; *People v. Leon* (2008) 161 Cal.App.4th 149, 163; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199.)

3. *Remand is Appropriate to Permit the Trial Court To Clarify Its Sentence on Counts 1 and 2.*

a. Pertinent Facts.

On the first day of trial, the court commented, "If you are convicted on this type of case, there's not much a judge can do. . . . Because the sentencing requirements are mandated by statute. Most of them are. There's very, very little discretion. In other words, there's little I can do with your sentence." Following

appellants' convictions, the People filed a three-page sentencing memorandum that listed the offenses and requested for each appellant a prison sentence of "40-life" on each of counts 1 and 2, noting that "[u]nder this computation, the total sentence for each defendant is 80 to life." Although it did not use the word "consecutive," the memorandum effectively asked the court to impose consecutive sentences. Aside from referencing the charges on which the jury found appellants guilty, and the jury's findings on the gang and firearm allegations, the memorandum did not present argument in favor of imposing consecutive, as opposed to concurrent, sentences. Neither appellant filed a sentencing memorandum.

The probation report did not expressly address the issue of consecutive versus concurrent sentences for either appellant. However, it did address aggravating and mitigating factors pertinent to any exercise of discretion in sentencing.

During the sentencing hearing, the court began by stating it had read and considered appellants' probation reports and the People's sentencing memorandum. The court then invited argument from Gutierrez's counsel, who stated, "I know that we're in a position where the statute and the court's -- the limitations of the sentence are pretty clear, and it's a very high sentence." Gutierrez's counsel then recited mitigating factors that Gutierrez was a young man with a supportive family, and a good kid who did not get into trouble. Although letters of recommendation are not part of the record on appeal, they were submitted to the court and, as argued by Gutierrez's counsel, evidenced Gutierrez's "exemplary" life.

Gutierrez's counsel acknowledged that the court had limited discretion, stating, "to the extent that the court has any discretion, which I know in this case there isn't much, I'd ask you to exercise that because basically, he, if given the opportunity, could have been anything." Escobar's counsel submitted the matter without argument. The court then inquired whether the prosecution had submitted a victim impact statement (there was none).

Before imposing sentence, the court addressed the mitigating factors for Gutierrez (noting he was "sort of the good child"). The court then stated, "However, it was Mr. Gutierrez who had the gun in his hand. It was Mr. Gutierrez who decided to pull the trigger. Although that does not make a difference, I did need to address that issue because this is, as [Gutierrez's counsel] states, it's mandatory sentencing. And the court will follow the mandatory sentence and sentence the defendants as follows." The court sentenced each appellant to prison on each of counts 1 and 2 to 15 years to life for attempted premeditated murder, plus 25 years to life for a firearm enhancement, and ordered each appellant to serve the terms on counts 1 and 2 consecutively, with the result each appellant's total prison sentence was 80 years to life. As to both appellants, the court stayed punishment on count 3 pursuant to section 654.

b. Analysis.

Appellants claim the trial court's imposition of consecutive sentences was error because it was unaware it had discretion to impose concurrent rather than consecutive 40-years-to-life prison sentences on counts 1 and 2. As noted in *People v. Downey* (2000) 82 Cal.App.4th 899, " 'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a

deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]' [Citation.] Where . . . a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination. [Citations.]" (*Id.* at p. 912.) Moreover, where the record is unclear concerning a sentencing disposition, we may vacate the sentence and remand the matter for resentencing to permit the trial court to clarify its sentence. (Cf. *People v. Garcia* (1997) 59 Cal.App.4th 834, 839; Pen. Code, § 1260.)

There is no dispute that a prison sentence of 40 years to life on each of counts 1 and 2 was mandatory. (*People v. Oates* (2004) 32 Cal.4th 1048, 1062-1068 [section 654's multiple victim exception applies]; *People v. Campos* (2011) 196 Cal.App.4th 438, 445, 448-454 [mandatory 15-year minimum parole eligibility term for attempted premeditated murder with gang finding]; §§ 186.22, subd. (b)(5), 187, subd. (a), 664, subd. (a), 12022.53, subds. (a)(1) & (18), (d) [mandatory firearm enhancement of 25 years to life], (g), & (h).) Moreover, "[i]t is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. (Pen. Code, § 669; [citation].)" (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

However, the record is unclear as to whether the trial court was aware of its discretion to impose concurrent sentences on counts 1 and 2. There was some evidence the court was aware of its discretion. For example, the court's electing to review the probation report, inviting and hearing argument from counsel at the sentencing hearing, inquiring into whether the prosecution submitted a victim impact statement, and discussing mitigating factors, provide evidence the court believed it had discretion to impose concurrent sentences. (See *People v. Leung* (1992)

5 Cal.App.4th 482, 501 ["had the court believed that consecutive terms were mandatory, it would not have stated reasons for their imposition since none would have been required."].) On the other hand, there was also evidence the court was unaware of its discretion. For example, the trial court stated, "it's *mandatory* sentencing." (Italics added.) The court also stated, "the court will follow *the mandatory* sentence and sentence the defendants *as follows*." (Italics added.)

In light of the above ambiguity, we will vacate appellants' sentences and remand for sentencing to permit the trial court to clarify whether it is aware of its discretion to impose concurrent sentences on counts 1 and 2, and to resentence appellants on those counts. We express no opinion as to which alternative, concurrent or consecutive sentences, the trial court should choose.[11]

4. *There Was No Violation of Appellants' Rights to Confrontation.*

In *Crawford v Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the high court "held that '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 761,

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[11] In light of the above analysis, there is no need to reach the issues of (1) whether appellants' sentences constituted cruel and/or unusual punishment, and whether that issue was preserved for appellate review, (2) whether the court abused its discretion by imposing consecutive instead of concurrent sentences on counts 1 and 2, or erred by failing to state reasons for imposing consecutive sentences, or (3) whether appellants received ineffective assistance of counsel regarding these matters.

fn. omitted.) In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), our Supreme Court observed that *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224] "made clear that the confrontation clause applies only to testimonial hearsay statements and not to such statements that are nontestimonial." (*Geier*, at p. 603.) Although the Supreme Court in *Crawford* did not define "testimonial evidence," it noted that such testimony includes statements made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' " such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements made during] police interrogations." (*Crawford,* at pp. 52, 68.)

Recently, in *People v. Sanchez* (2016) 63 Cal.4th 665, the California Supreme Court reversed a finding by the jury that a gang allegation was true, holding that "case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay" (*id.* at p. 670) and that "[s]ome of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford*."[12] (*Id.* at pp. 670-671.)

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[12] *Sanchez* was decided after argument in this case. We invited further briefing from the parties addressing the impact, if any, of *Sanchez* on this case. We have reviewed and considered the additional briefing.

In *Sanchez,* the gang expert, Detective Stow, testified that the defendant was a member of the Delhi gang (Delhi) and possessed a firearm, and narcotics for sale, for the benefit of Delhi. (*Sanchez, supra,* 63 Cal.4th at p. 673.) As the basis for his testimony, Stow relied on information and/or statements contained in police documents, i.e., (1) a "STEP notice,"[13] (2) two police reports relating the circumstances of the defendant's presence during, and/or his statements to police about, two shootings of gang members, respectively, (3) a field identification card relating a police contact with the defendant, who was in the company of a Delhi member, and (4) a police report relating a police contact and the defendant's arrest with a Delhi member. (*Id. at* pp. 672-673.)

Stow admitted he had never met the defendant and was not present when the defendant was given the STEP notice or when the other police contacts with the defendant occurred. (*Sanchez, supra,* 63 Cal.4th at p. 673.) The police reports were not admitted into evidence. (*Id*. at p. 694.)

Notwithstanding the trial court's instruction that the jury not accept the other officers' statements as proof of the truth of the matters stated, the Supreme Court concluded there was no denying that such case-specific facts are offered as true. Without independent competent proof of these facts, the jury had no basis on which to accept the expert's opinion. (*Sanchez, supra*, 63 Cal.4th at p. 684.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they

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[13] "This acronym is a reference to the California Street Terrorism Enforcement and Prevention Act." (*Sanchez, supra*, 63 Cal.4th at p. 672, fn. 3.)

are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

Sanchez reviewed post-*Crawford* case law and observed that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, but statements are testimonial when the circumstances objectively indicate there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Sanchez, supra*, 63 Cal.4th at p. 688.) *Sanchez* noted that other post-*Crawford* decisions turned on the formality of the statement at issue. (*Id.* at p. 692; see *People v. Dungo* (2012) 55 Cal.4th 608, 619.)

Sanchez concluded that (1) the STEP notice signed by a police officer under penalty of perjury and relating information about, and statements made by, the defendant, and (2) the police reports, which were compiled during a police investigation of completed crime, were testimonial. (*Sanchez, supra,* 63 Cal.4th at pp. 694-697.) *Sanchez* also concluded that a field identification card, if made in the course of an ongoing investigation of a crime, would be testimonial. (*Id.* at p. 697.) On the other hand, testimony providing information that was not case-specific and that concerned general gang behavior, its territory, and the gang's conduct was relevant and admissible. (*Id.* at p. 698.)

Escobar argues, inter alia, "The *only* evidence of Appellant's connection to a gang, other than the events underlying this case, was [Deputy Fernandez's] testimony, which was based on the March 2011 [field identification] card, three years before trial." (Italics added.) We reject the argument.

Fernandez testified that on March 4, 2011, Escobar *admitted* to Fernandez that Escobar was a JM member. That testimony was based on Fernandez's personal knowledge of what Escobar told him, not the card. Fernandez used his field identification card only to refresh his memory as to Islas's name and the card was not admitted into evidence. Likewise, Officer Bonilla testified that in May 2012, Gutierrez *admitted* to Bonilla that Gutierrez was a JM member known as Speedy. Fernandez's testimony relating Escobar's statement to him, and Bonilla's testimony relating Gutierrez's statement to him, did not violate appellants' respective rights to confrontation; a defendant cannot complain that the defendant cannot confront himself or herself. (Cf. *People v. Roldan* (2005) 35 Cal.4th 646, 711; see *People v. Rangel* (2016) 62 Cal.4th 1192, 1215 & fn. 7; *United States v. Nazemian* (9th Cir., 1991) 948 F.2d 522, 525-526.)

Moreover, in this case, the People did not rely exclusively on Arevalo's expert testimony to establish facts recorded in field identification cards. Instead, the People called and subjected to cross-examination, several officers who had contact with appellants. Escobar, joined by Gutierrez, contends that Arevalo improperly relied "on FI cards (other than the one Dep. Fernandez testified about)." However, the record demonstrates that Arevalo relied on Fernandez's field identification card only when Arevalo testified about Escobar. Further, the only field identification card that Arevalo referred to and that was not filled out by Fernandez was Bonilla's field identification card identifying Gutierrez. To the extent the field identification cards of Fernandez and Bonilla reflected statements of Escobar and Gutierrez, respectively, a defendant has no right to confront himself or herself. Finally, to the extent appellants complain

that Arevalo's expert testimony was based on hearsay, any hearsay statements by appellants were admissible under the admissions hearsay exception (Evid. Code, § 1220) and, in light of the strong evidence of appellants' guilt, any error in the admission of other hearsay was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Escobar's contention that "casual conversations with unidentified individuals including gang members and police officers" was improper testimonial hearsay under *Crawford* is incorrect as a matter of law. The key issue for distinguishing testimonial statements from nontestimonial statements under *Crawford* is whether the information was elicited in a formal setting like a preliminary hearing, a police interrogation, or a formal investigation. As noted in *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), "the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*Id.* at p. 984.) *Cage* noted that, according to *Crawford,* " '[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a *casual* remark to an acquaintance does not.' [Citation.]" (*Cage,* at p. 984, fn. 14, italics added.) While testimony based on casual conversations may constitute statements inadmissible under the rules governing hearsay, it is not testimonial hearsay for purposes of *Crawford*.

In supplemental briefing, Escobar identifies additional testimony that he contends was admitted in violation of *Crawford*: Arevalo's testimony South members shot at JM members earlier that day, Arevalo's testimony there was a "turf war," and his testimony that appellants were " 'soldiers' with a

propensity for violence who could be counted on by the gang to 'go do shootings.' " As explained below, we find no error in the admission of these statements.

Before permitting Arevalo to testify at trial, the trial court allowed appellants to cross-examine Arevalo in an Evidence Code section 402 hearing conducted outside the presence of the jury. During that hearing, Arevalo testified that he was present when Alvarez, a JM member who was a victim of the 7:00 a.m. shooting attributed to South, told homicide detectives that he recognized the shooter as a South gang member. Escobar's trial counsel argued that Arevalo's testimony the shooting was in retaliation for the early morning shooting should be excluded as testimonial hearsay because the information was "gained during investigations for purposes of prosecution." The trial court overruled the objection, concluding the testimony was admissible nontestimonial evidence because it came from a witness who was not in custody and was being interviewed as a victim.

However, confrontation clause error under *Crawford* does not depend on whether the out-of-court declarant is a suspect or a victim; it depends on the circumstances under which the hearsay statement was made. In *Cage*, a victim waiting in the emergency room an hour after sustaining injuries described the circumstances of his stabbing to a police officer who asked, "What happened?" Although the conversation was informal, our Supreme Court concluded the victim's statements were testimonial noting that "the requisite solemnity was imparted by the potentially criminal consequences of lying to a police officer." (*Cage, supra,* 40 Cal.4th at p. 986.) There is no dispute that Arevalo's knowledge that Alvarez identified the South shooter came from a conversation with homicide police officers who were

investigating the homicide of Alvarez's companion. If Arevalo had quoted Alvarez's statement to police at trial, Arevalo's testimony would have constituted testimonial hearsay in violation of the confrontation clause if offered for the truth of the matter.

However, apart from whether Alvarez's statements attributing his shooting to a rival gang were admissible for their truth, they were admissible to show Alvarez's motivation as a member of JM (appellants' gang) to retaliate. As such, they were nonhearsay. Arevalo's testimony "the Junior Mafia gang members believed it was South Los" was likewise admissible because JM members' *perception* that South was responsible for Alvarez's shooting (rather than the accuracy of that perception) was material to appellants' motive to retaliate. We therefore conclude that Arevalo did not offer inadmissible hearsay and that appellants' Sixth Amendment rights were not compromised. (Cf. *People v. Hill* (2011) 191 Cal.App.4th 1104, 1136; see *Cage, supra*, 40 Cal.4th at p. 984 & fn. 14.)

We also find no error in Arevalo's testimony that appellants were "soldiers" and that the two gangs were engaged in a "turf war." These statements were properly admitted as opinions based on admissible evidence about appellants' ties with the JM gangs and the circumstances of their involvement in the shootings in this case.

5. *No Impermissible Prosecutorial Jury Argument Occurred.*

Detective Kirby testified he was working about 9:00 p.m. on February 27, 2013. The prosecutor asked what role Kirby had in the investigation, and Kirby replied, "*I interviewed the two defendants that night*." Escobar objected the latter testimony violated *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d

106] (*Griffin*) because the testimony implied Escobar had invoked his Fifth Amendment rights when he was interrogated. The prosecutor explained she had intended only that Kirby testify he had heard Escobar tell Gutierrez, "Don't snitch." The court regarded the challenged testimony as "probably" not proper but concluded no error had occurred under *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*) or *Griffin*. The court struck the prosecutor's question and Kirby's answer, and instructed the jury not to consider either for any purpose.

Kirby later testified that while he was escorting Escobar in the station, he heard Escobar yell at Gutierrez, "You better not snitch." During jury argument, Escobar's counsel suggested Escobar was innocently driving and was surprised by the shooting. During final argument, the prosecutor argued Escobar did not pull over for the police, exit the car with hands up, protest his innocence, and say he was a witness and not a crime partner.

Escobar characterizes Kirby's reference to interviewing appellants and the prosecutor's jury argument as *Doyle* and/or *Griffin* error. In *Doyle*, the United States Supreme Court stated, "We hold that the use for *impeachment* purposes of petitioners' *silence*, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (*Doyle, supra,* 426 U.S. at p. 619, italics added.) *Griffin* holds it is error for a prosecutor to comment, directly or indirectly, on the failure of the defendant to *testify*. (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.) The prosecutor may, however, comment " 'on the state of the evidence.' " (*People v. Hovey* (1988) 44 Cal.3d 543, 572 (*Hovey*).) In determining whether *Griffin* error has occurred, we ask whether there is a reasonable likelihood jurors could have understood the

prosecutor's comments to refer to the defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) As noted in *Hovey*, "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt can be drawn therefrom, are uniformly held to constitute harmless error." (*Hovey*, at p. 572.) We hold no *Doyle*, *Griffin*, or other constitutional error occurred.

6. The Trial Court Did Not Err by Reading the "Kill Zone" Instruction.

As mentioned, the court, using CALCRIM No. 600, instructed on a "kill zone."[14] Gutierrez argues this court should reverse the judgment on the ground the court's instruction should have referred to a "zone of *lethal* harm" rather than a "zone of harm." We reject the argument; the language given was proper. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1395-1396.)

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[14] The instruction stated, inter alia, "A person may intend to kill a specific victim or victims and at the same time to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the Attempted Murder of Diego Fernandez, the People must prove that the defendant not only intended to kill Justin Padilla but also either intended to kill Diego Fernandez, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Diego Fernandez or intended to kill Justin Padilla by killing everyone in the kill zone, then you must find the defendant not guilty of the Attempted Murder of Diego Fernandez."

Gutierrez also argues his trial counsel's reference to "transferred intent" in his closing argument[15] constituted ineffective assistance of counsel. We reject the claim. The doctrine of transferred intent does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 317 (*Bland*).) However, Gutierrez's trial counsel made only a single, brief reference to transferred intent. During the final charge, the court, using CALCRIM No. 600, instructed the jury on the kill zone theory, and the instruction did not refer to transferred intent. The court, using CALCRIM No. 200, instructed the jury that "[y]ou must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed these instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The jury found not only that appellants committed attempted murders with the requisite intent, but that the attempted murders were premeditated and deliberate. Any constitutionally-deficient representation in the reference by Gutierrez's trial counsel to transferred intent was not prejudicial (see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219), therefore, no ineffective assistance of counsel occurred.

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[15] Gutierrez's trial counsel stated, "And this zone of harm or a kill zone doesn't change anything. That just means if I want to shoot one person and there are other people around -- I'm sorry. If I want to kill one person and there are other people around, the Court said that I can -- they can transfer the intent to kill person 1 also to person 2. But what's required is the same intent to kill. I can't intend to harm or scare someone and you make that an intent to kill by calling it a kill zone. It's absolutely not the law."

Gonzales further contends there was no evidence he intended to kill Justin by killing everyone in the area where Justin was located. According to Gutierrez, "there was no indication that bullets were sprayed over a wide area encompassing [Diego]." Gutierrez points to other evidence the shooter aimed in a downward direction as suggesting an intent to instill fear rather than strike the victims.

As explained in *Bland, supra,* 28 Cal.4th at pp. 329-330, a person who desires to kill a particular target may concurrently intend to kill others within a kill zone; where a defendant intentionally creates a kill zone to ensure the death of his primary victim, the trier of fact may reasonably infer, based on the defendant's method of attack, an intent to kill others concurrent with the intent to kill the primary victim. For example, " 'a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire . . . has intentionally created a "kill zone" to ensure the death of [the] primary victim.' " (*Id.* at pp. 329-330.) Under these circumstances, " 'the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.' " (*Id.* at p. 330.)

In *Bland*, the court concluded a defendant who shot a flurry of bullets intending to kill the driver of a car concurrently intended to kill the passengers and could be convicted of the attempted murder of others in the automobile (the kill zone). Similarly, in this case, the record contains substantial evidence the victims were playing basketball together when Gutierrez rapidly fired a barrage of bullets (eight or ten bullets) in their direction. As mentioned, there was substantial evidence that

Justin and Diego were in a relatively small and confined backyard, they concluded their best chance of escaping was to run southwest towards the side of the house, and Gutierrez was shooting at them as they both ran towards the narrow opening on the side of the house. There was evidence the victims were close to one another during the shooting; as mentioned, there was evidence that, during the ongoing shots, and when two bullets struck Justin, Diego was close enough to Justin to hear him fall and to turn back to help him. Another bullet struck a gate near Diego.

The above facts are sufficient to support a finding Diego was in a kill zone appellants created intending to kill Justin, and Gutierrez concurrently intended to kill Justin and anyone in the zone, including Diego. We therefore conclude it was not error to give the kill zone instruction (and also conclude that any failure by trial counsel to object to the instruction with respect to any of the above issues was not ineffective assistance of counsel).

DISPOSITION

The judgments are affirmed, except appellants' sentences are vacated and the matter is remanded with directions to the trial court to clarify whether it is aware of its discretion to impose concurrent sentences on counts 1 and 2, and to expressly exercise that discretion and resentence appellants accordingly. The trial court is directed to forward to the Department of Corrections and Rehabilitation a new abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HOGUE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.